IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-654**

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

*Petitioner,*

*vs*

FEDERAL TRADE COMMISSION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

## MOTION OF SAMUEL E. PARKER AND LYLA E. PARKER FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AS AMICUS CURIAE.

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*May It Please the Court:*

Samuel E. Parker and Lyla E. Parker respectfully move this Court for leave to file the accompanying brief in this case as *Amicus Curiae.*

The consent of the Solicitor General, as Attorney for the Respondent herein, the Federal Trade Commission, has been obtained, but the attorney for the Petitioner, The Great Atlantic & Pacific Tea Company, Inc., has refused to consent to the filing of a brief by Samuel E. Parker and Lyla E. Parker, as *Amicus Curiae.*

## STATEMENT OF INTEREST.

This case relates to sales of milk and other dairy products by Borden, Inc. ("Borden") to the Petitioner, The Great Atlantic & Pacific Tea Company, Inc. ("A & P"), during the period November 1, 1965 through February, 1972 (the "contract period"), in a certain multistate area comprising twenty-six counties of Northern Illinois and seven counties of Northwestern, Indiana (the "contract area"). The contract area included Cook County, Illinois, *i.e.,* Chicago and its principal suburbs.

During this period, and in this area, Borden sold milk and other dairy products, for resale, to two groups of retail grocery stores:

a. Some 235 retail grocery stores owned and operated by the Petitioner, A & P.

b. Some 200 or more retail grocery stores owned by independent grocers, including the Applicants, Samuel E. Parker and Lyla E. Parker.

During this period, and in this area, sales of milk and other dairy products by Borden to A & P were made pursuant to a certain "private label" supply contract entered into between Borden and A & P, on or about November 1, 1965. The prices which Borden charged A & P pursuant to this contract were substantially less than those which it charged the independent grocers.

The contract formalized a certain offer made by Borden and accepted by A & P. At the time Borden made this offer, it informed A & P that the offer was being extended for the purpose of meeting competition in the form of an existing offer or offers which A & P then had in its possession. A & P accepted this offer of Borden with knowledge that Borden thereby had granted it a substantially lower price than that offered by the only other competitive bidder and without notifying Borden of this fact.

Pursuant to a further understanding between Borden and A & P, the milk and other dairy products purchased under the contract were sold to the public at the same price as milk and other dairy products purchased under the Borden label. That is to say, the lower price, or discount, received by A & P pursuant to the contract was not "passed on" to the consuming public, but was retained by the Petitioner, A & P. The purpose of this arrangement was to sustain and maintain the retail price of milk and other products in the contract area.

The Respondent, Federal Trade Commission, and the Court of Appeals for the Second Circuit, have held that by this contract, the Petitioner, A & P, induced and received, in violation of Subsection 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, price discriminations forbidden by Subsection 2(a) of that Act. 15 U. S. C. § 13(a, f).

The applicants Samuel E. Parker and Lyla E. Parker, owned a retail grocery store in Chicago, Illinois. Throughout the contract period they purchased milk and other dairy products from Borden. Throughout this period, they were in competition with three retail grocery stores owned by the Petitioner, A & P.

In December, 1971, the applicants, Samuel E. Parker and Lyla E. Parker, commenced suit against the petitioner, A & P, and Borden. They brought this suit individually and as representative plaintiffs on behalf of the 200 other independent grocers in the contract area who, during all or part of the contract period, also had purchased milk and other dairy products from Borden. Class certification was denied by the district court on August 9, 1978. The individual suit of the Parkers is presently pending in the United States District Court for the Northern District of Illinois as Cause No. 71 C 3075. It will be referred to herein as the *Parker* suit.

Count I of the Complaint in the *Parker* suit was based upon, and followed as closely as possible, Count II (the Robinson-Patman Act Count) in the Federal Commission's Complaint against the Petitioner, A & P, in this case.

Under Section 5 of the Clayton Act, 15 U. S. C. § 16(2), the decisions of the Federal Trade Commission and the Court of Appeals for the Second Circuit, in this case, if affirmed by the Court, will be *prima facie* evidence of almost every element of proof necessary to establish the liability of A & P under Count I of the *Parker* suit.

Clearly, the Applicants, Samuel E. Parker and Lyla E. Parker, have a most substantial interest in this case.

**PURPOSE OF BRIEF AS AMICUS CURIAE.**

The Applicants believe that the brief of the Respondent, Federal Trade Commission, will not make, or will not sufficiently emphasize, the following points which they believe should be considered by the Court in its disposition of this case.

1. The Court has held that the Robinson-Patman Act is to be construed so as to effectuate "the broad goals which Congress intended it to effectuate." *FTC* v. *Fred Meyer, Inc.*, 390 U. S. 341, 349, 88 S. Ct. 904 (1968). Specifically, "[T]he Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *FTC* v. *Henry Broch & Co.*, 363 U. S. 166, 168, 80 S. Ct. 1158, 1160, 4 L. Ed. 2d 1124 (1960); *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 543-544, 80 S. Ct. 1267, 4 L. Ed. 2d 1385 (1960).

2. The legislative history of the Robinson-Patman Act, and particularly the Federal Trade Commission Report on chain store practices upon which Congress based that Act, singled out for condemnation the very practices by which the Petitioner, A & P, extracted from Borden the illegal, discriminatory discounts here involved. *Federal Trade Commission, Final Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess. 24, 26 (1935).

3. The Petitioner, A & P, blandly asserts that the decision of the Court of Appeals would operate "to deprive consumers of the benefits" of "bargaining by buyers and competition among

sellers." Pet.'s Br. 14. Nothing could be further from the truth. A & P's customers derived no benefit whatsoever from the transactions here at issue. By agreement between A & P and Borden, the price discounts received by A & P under the contract were not "passed on" but were retained by A & P.

4. It has been recognized, particularly in the retail grocery field, that a price discrimination in favor of a large chain can have a most adverse affect on its competitors even though the chain does not use the discretionary price discounts it receives to undersell those competitors. *Foremost Dairies, Inc.* v. *FTC*, 348 F. 2d 674, 680 (5th Cir. 1965), *cert. denied*, 382 U. S. 959, 86 S. Ct. 435, 15 L. Ed. 2d 362 (1965); *National Dairy Products Corp.* v. *FTC.*, 395 F. 2d 517, 521-522 (7th Cir. 1968), *cert. denied*, 393 U. S. 977, 89 S. Ct. 444, 21 L. Ed. 2d 438 (1968).

5. The Petitioner, A & P, was not in good faith when it accepted the Borden offer. A & P then believed that the Borden offer "beat," and did not merely "meet," the only competitive offer which A & P had received. A & P was also on Notice that Borden did not have a cost justification defense for its offer.

WHEREFORE, Applicants pray that they may be permitted to file instanter, the accompanying *Amicus Curiae* Brief in support of the Decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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## INDEX.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF FOR SAMUEL E. PARKER AND LYLA E. PARKER AS AMICUS CURIAE.

*May It Please the Court:*

This Amicus Curiae Brief is submitted on behalf of Samuel E. Parker and Lyla E. Parker, individually, in support of a decision of the Federal Trade Commission, affirmed and ordered enforced by the United States Court of Appeals for the Second Circuit, against the Petitioner.

Consent to the filing of this brief has been obtained from the Respondent pursuant to Rule 42(2). Consent to the filing of this brief was refused by the Petitioner. A Motion for Leave to File, pursuant to Rule 42(2), has been presented to the Court together with this brief.

## STATEMENT OF INTEREST.

This case relates to sales of milk and other dairy products by Borden, Inc. ("Borden"), to the Petitioner, The Great Atlantic & Pacific Tea Company, Inc. ("A & P"), during the period November 1, 1965 through February, 1972 (the "contract period"), in a certain multistate area comprising twenty-six counties of Northern Illinois and Seven Counties of Northwestern, Indiana (the "contract area"). The contract area included Cook County, Illinois, *i.e.*, Chicago and its principal suburbs.

During this period, and in this area, Borden sold milk and other dairy products, for resale, to two groups of retail grocery stores:

a. Some 235 Retail Grocery Stores owned and operated by the Petitioner, A & P.

b. Some 200 or more Retail Grocery Stores owned by independent grocers, including Amicus, Samuel E. Parker and Lyla E. Parker.

During this period, and in this area, sales of milk and other dairy products by Borden to A & P were made pursuant to a certain "Private Label" supply contract entered into between Borden and A & P, on or about November 1, 1965. The prices which Borden charged A & P pursuant to this contract were substantially less than those which it charged the independent grocers.

The contract formalized a certain offer made by Borden and accepted by A & P. At the time Borden made this offer, it informed A & P that the offer was being extended for the purpose of meeting competition in the form of an existing offer or offers which A & P then had in its possession. A & P accepted this offer of Borden with knowledge that Borden thereby had granted it a substantially lower price than that offered by the only other competitive bidder and without notifying Borden of this fact.

Pursuant to a further understanding between Borden and A & P, the milk and other dairy products purchased under the contract were sold to the public at the same price as milk and other dairy products purchased under the Borden label. That is to say, the lower price, or discount, received by A & P pursuant to the contract was not "passed on" to the consuming public, but was retained by the Petitioner, A & P. The purpose of this arrangement was to sustain and maintain the retail price of milk and other products in the contract area.

At the time the contract was made, sales of milk and other dairy products by Borden to A & P were approximately 55% of all wholesale sales of such products by Borden in the contract area. Loss of the A & P business would have caused a plant recently erected by Borden at Woodstock, Illinois, to operate at a substantial loss. The price discounts granted to the Petitioner, A & P, by Borden, pursuant to the contract, were in response to a threat by A & P that it would take its business elsewhere unless it received a satisfactory price reduction from Borden.

The Respondent, Federal Trade Commission, and the Court of Appeals for the Second Circuit, have held that by this contract the Petitioner, A & P, induced and received, in violation of Subsection 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, price discrimination forbidden by Subsection 2(a) of that Act. 15 U. S. C. § 13(a, f). *Great Atlantic & Pacific Tea Company, Inc.* v. *Federal Trade Commission,* 557 F. 2d 971 (2d Cir. 1977).

Amicus, Samuel E. Parker and Lyla E. Parker, owned a Retail Grocery Store in Chicago, Illinois. Throughout the contract period, they purchased milk and other dairy products from Borden. Throughout this period, they were in competition with three Retail Grocery Stores owned by the Petitioner, A & P.

In December, 1971, Amicus, Samuel E. Parker and Lyla E. Parker, commenced suit against the Petitioner, A & P and

Borden. They brought this suit individually and as representative plaintiffs on behalf of the 200 other independent grocers in the contract area who, during all or part of the contract period, also had purchased milk and other dairy products from Borden. The District Court denied class certification, but allowed the individual action of the amicus, Samuel E. Parker and Lyla E. Parker, to stand. This suit is presently pending in the United States District Court for the Northern District of Illinois as Cause No. 71 C 3075. It will be referred to herein as the *Parker* suit.

Count I of the Complaint in the *Parker* suit was based upon, and followed as closely as possible, Count II (the Robinson-Patman Act Count) in the Federal Trade Commission's Complaint against the Petitioner, A & P, in this case.

Section 5 of the Clayton Act, 15 U. S. C. § 16(a), provides in pertinent part as follows:

> "(a) A final judgment or decree heretofore or hereafter rendered in any Civil or Criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against defendant under said laws . . ., as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."

This Section has been held applicable to decisions of the Federal Trade Commission, which, as here, have been sustained and ordered enforced by a Court of Appeals. *Purex Corp. Ltd.* v. *Proctor & Gamble Co.*, 453 F. 2d 288 (9th Cir. 1971), *cert. denied*, 405 U. S. 1065, 92 S. Ct. 1493, 31 L. Ed. 2d 795 (1972); *Farmington Dowel Products Corp.* v. *Forster Mfg. Co.*, 421 F. 2d 61 (1st Cir. 1969).

Under Section 5 of the Clayton Act, the decisions of the Federal Trade Commission and the Court of Appeals for the Second Circuit, will be *prima facie* evidence of almost every element of proof necessary to establish the liability of A & P under Count I of the *Parker* suit.

We accordingly submit this Amicus Brief in support of the Decision of the United States Court of Appeals for the Second Circuit.

## ARGUMENT.

### I.

### The Robinson-Patman Act Is To Be Construed So as to Effectuate the Congressional Intent of Proscribing Certain Objectional Business Practices, Among Them the Very Acts of Which the Petitioner, A & P, Stood Accused in This Case, and of Which It Was Found Guilty by the FTC and the Court of Appeals.

In *FTC* v. *Fred Meyer, Inc.*, 390 U. S. 341, 349-350 (1968), this Court stated:

> "Conceding that the Robinson-Patman Amendments by no means represent an exemplar of legislative clarity, we cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate. See, e.g., *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 516-521, 83 C. Ct. 358, 365-368, 9 L. Ed. 2d 466 (1963); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co., cert. denied*, 326 U.S. 773, 66 S. Ct. 231, 90 L. Ed. 467 (1945). We start with the proposition that '[T]he Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' *FTC* v. *Henry Broch & Co.*, 363 U.S. 166, 168, 80 S. Ct. 1158, 1160, 4 L. Ed. 2d 1124 (1960). The role within the statutory scheme which Congress intended for § 2(d) is well documented in the legislative history. An investigation of chain store buying practices undertaken by the Federal Trade Commission, at Congress' request, has indicated that § 2 of the Clayton Act was an inadequate deterrent against outright price discrimination. The investigation also revealed that certain practices by which large buyers induced concessions which their smaller competitors could not meet

were wholly beyond the reach of § 2. *It is significant that Congressional concern had focused on the buying practices of large retailers, particularly the chain stores, because it was felt that they were threatening the continued existence of the independent merchant.*" (Emphasis added)

Similarly, in *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 543-544 (1960), this Court said:

> "It is, of course, quite true—and too well known to require extensive exposition—that the 1936 Robinson-Patman Amendments to the Clayton Act were motivated principally by Congressional concern over the impact upon secondary-line competition of the burgeoning of mammoth purchasers, notably chain stores."

In *Standard Motor Products, Inc.* v. *FTC*, 265 F. 2d 674, 676 (2d Cir. 1959), the Court said:

> "The statute (Robinson-Patman) was enacted in direct response to the growth of a few nation-wide chain store corporations in the 1920's and 1930's. It is evident from the legislative history that Congress sought to curtail the concentration of economic power in the distributive area of the economy by eliminating inequalities derived from sheer economic power while at the same time not stifling competition based on real cost savings and efficiency."

So, also, in *National Dairy Products Corp.* v. *FTC*, 395 F. 2d 517, 523 (7th Cir.) *cert. denied*, 393 U. S. 977 (1968):

> "One of the reasons for its (the Robinson-Patman Act) enactment was to protect the independents from the chains and other large buying groups."

And in the FTC report on chain store practices, upon which Congress based the Robinson-Patman Act, the following practices by chain stores, in general, and by the Petitioner, A & P, in particular, were singled out:

> "As shown elsewhere, the ability of the chain store to obtain its goods at lower cost than independents and of large chains to obtain goods at lower cost than small chains is an outstanding feature of the growth and development of chainstore merchandising. These lower costs have fre-

quently found expression in the form of special discounts, concessions, or collateral privileges which were not available to smaller purchasers. * * *

"There has been considerable criticism of some of the methods used by chain systems in their bargaining with manufacturers for special-price concessions. The criticism comes largely from the manufacturers themselves, many of whom protest the methods used while yielding to them. Some state their yielding was only as a result of 'threats' and 'coercion.' All of these cases of threats and coercion, however, seem to be reducible to chain-store statements or intimations to the manufacturers that unless the concessions sought were granted, the chain would either enter upon the manufacture of the goods in question for itself, buy them from some other source than the seller with whom it was then negotiating, or would discourage the sale of his products.

"A vivid idea of the enormous bargaining power embodied in chain-store purchases may be gained from the fact that The Great Atlantic & Pacific Tea Company makes purchases of merchandise amounting to over $800,000,000, annually, and other large chains make purchases in proportionate amounts.

* * * * *

"Fear of losing the business of certain chains through whom a large part of their output was marketed, and threat to manufacture a competing product were reasons assigned by some grocery manufacturers for acceding to the demand of chain-store buyers for special concessions in the way of special prices, discounts and allowances."

*Federal Trade Commission, Final Report On The Chain-Store Investigation,* S. Doc. No. 4, 74th Cong., 1st Sess. 24, 26 (1935).

Three decades under Robinson-Patman apparently left no imprint on A & P, for it was predatory tactics of this very nature, the threat of taking its business elsewhere, which A & P employed to extract, from a reluctant Borden, the massive price discounts here involved.

Thus, in findings of Fact 34, 35 and 41 of the Initial Decision, the Administrative Law Judge found as follows:

> "34. A & P's business represented more than 55 percent of Borden's wholesale route business in the Chicago area and 25 percent of its Woodstock Plant production. Borden could not, therefore, afford to lose the A & P business by refusing to lower its prices to A & P (CX. 74 F, 42 A-D). * * * If Borden refused A & P's request for lower prices, Borden would lose A & P's business and the volume necessary to operate Woodstock efficiently. Neither position was desired.
>
> "35. On May 25, 1965, Tarr and Malone delivered Borden's offer for the outside areas to A & P and discussed Borden's position with Schmidt (CX 19A). Borden pointed out that it expected almost no profit from the A & P contract, but that it was presenting such a bid because A & P's business was vital to Borden's efficient use of its Woodstock Plant. * * *
>
> * * * * *
>
> "41. Malone calculated that if Borden lost A & P business Borden's gross profit would be reduced more than 1.6 million dollars per year. . . ."

It is incontestible that the acts of which the Petitioner, A & P, stands convicted, by the FTC and the Court of Appeals for the Second Circuit—the use of its massive purchasing power to extract huge, unwarranted discounts from the prices which Borden charged its other customers, were precisely the activities which Congress sought to proscribe when it enacted the Robinson-Patman Act; and the Amicus, Samuel and Lyla Parker, and the other independent grocers also buying from Borden, on whose behalf they brought the *Parker* suit as representative plaintiffs, were the very persons Congress sought to protect when it enacted the Robinson-Patman Act more than forty years ago.

## II.

**There Is No Question But That the Petitioner, A & P, Received Massive, Discriminatory Discounts on Its Purchases from Borden.**

The Petitioner, A & P, attempts to belittle the discriminatory discounts involved in this case.

It does so by centering on the difference between the Borden offer, which it accepted, and the only competitive offer, that of the Bowman Dairy Company.

It characterizes the difference between the two offers as a "matter of mills." Pet.'s Br. 13, and asserts that the Borden bid was only "marginally (*i.e.*, no more than 1.5%, accepting the FTC's figures) lower than Bowman's offer." Pet.'s Br. 15.

A & P conveniently ignores the large, indeed huge, gap between the prices charged it under the contract and the prices which Borden charged the independent grocers in the contract area.

Attached to this Brief, as Exhibit A, is the Appendix to the Initial Decision in the FTC proceedings in this case. This exhibit consists of nine pages of tables showing the discounts received by A & P pursuant to the contract, during the first half of the contract period, on the five principal products covered by the contract—regular milk in gallon, half gallon and quart containers, and 2% milk and skim milk in half-gallon cartons—as compared to those given "non-A & P Stores." The right hand column on each table is labeled "percent overcharge"—and a footnote states that this percentage was "calculated by dividing the difference between the minimum price paid by others and the private label price paid by A & P."

This exhibit demonstrates, graphically, that there was massive, sustained discrimination against each and every independent grocer who bought from Borden in the contract area. For example, for regular milk in half-gallon cartons, the "percent

overcharge" ranged over the period covered (November 1, 1965 through December 31, 1968) from 9.7% to 13.9%; and for skim milk, in half gallon cartons, from 13.7% to 18.0%.

## III.

**The Discriminatory Discounts Here Involved Did Not Benefit the Consuming Public, Only A & P. Indeed, They Harmed That Public by Undermining the Competitive Position of Hundreds of Independent Grocery Stores.**

The Petitioner, A & P, blandly asserts that the Decision of the Court of Appeals would operate "to deprive consumers of the benefits" of "bargaining by buyers and competition among sellers." Pet.'s Br. 14. Nothing could be further from the truth. A & P's customers derived no benefit whatsoever from the transactions here at issue. By agreement between A & P and Borden, the price discounts given A & P under the contract were not "passed on" to A & P's customers, the "consumers," but were instead retained, or pocketed by A & P.

Moreover, it has been recognized, particularly in the retail grocery field, that a price discrimination in favor of a large chain of stores can have a most adverse affect on its competitors even though the chain does not use the discriminatory price discounts it receives to undersell its competitors. *Foremost Dairies, Inc.* v. *FTC*, 348 F. 2d 674, 680 (5th Cir.), *cert. denied*, 382 U. S. 959, 86 S. Ct. 435, 15 L. Ed. 2d 362 (1965).

> "It is unnecessary that there be evidence that the favored customer actually undersold his rivals; a substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field or it can enable him to offer a customer attractive services, which will give him a substantial advantage over his competition."

*Accord, National Dairy Products Corp.* v. *FTC*, 395 F. 2d 517, 522 (7th Cir.), *cert. denied*, 393 U. S. 977, 89 S. Ct. 444, 21 L.

> "[I]njury may be inferred even if the favored customer did not undersell his rivals, for a substantial price, advantage can enlarge the favored buyer's profit margin or enable him to offer attractive services to his customers."

Thus, the illegal price discounts received by A & P from Borden did not benefit the consuming public. On the contrary, they harmed the consuming public by injuring competition generally—by weakening the competitive position, vis a vis A & P, of hundreds of independent grocery stores, which also sold Borden products.

## IV.

**The Petitioner, A & P, Was Not In Good Faith When It Accepted the Borden Offer. A & P Believed That the Borden Offer "Beat," and Did Not Merely "Meet," the Only Competitive Offer A & P Had Received. A & P Was Also on Notice That Borden Did Not Have a Cost Justification Defense for Its Offer.**

Subsection 2(f) of the Robinson-Patman Act forbids a buyer "knowingly to induce or receive a discrimination in price which is prohibited by this Section." Subsection 2(b) of the Act permits a seller to defend "by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor." 15 U. S. C. § 13(b, f).

We submit that in order to effectuate "the broad goals which Congress intended . . . [the Robinson-Patman Act] to effectuate" Subsections 2(b) and 2(f) should be construed *in pari materia.* That is to say, the buyer, as well as the seller, must be in "good faith" when it accepts a discriminatory offer on the ground that such offer only meets, but does not beat, the equally low price of a competitor.

By this test, the Petitioner, A & P, was very definitely not in "good faith" when it accepted the Borden offer.

In the first place, A & P believed that the Borden offer did not merely "meet," but that it "beat," the only competitive offer which A & P had received, that of the Bowman Dairy Co.

> "The second Borden bid was then reviewed by Herschel Smith, A & P's National Director of Purchases in New York. Smith testified that at the time, he regarded the second Borden bid as 'substantially better' than the Bowman bid." *Great Atlantic & Pacific Tea Co., Inc.* v. *FTC*, 557 F. 2d 971, 976 (2d Cir. 1977).

Secondly, the Petitioner, A & P, was on Notice, when it accepted the Borden offer, that Borden did not have a "cost justification" defense, but that its only possible defense was that it was meeting, but not beating, the equally low price of a competitor.

> "Minkler [of Borden] emphasized to A & P's Schmidt at the time this second bid was offered that it was being made only to meet the rival Bowman bid and that Borden knew 'of no other way to justify this.' Before accepting the second and final Borden bid, A & P's Schmidt requested a letter from Borden to the effect that the prices being offered A & P were proportionately available to others. Borden's 'availability letter' stated only that it felt its prices were proper under applicable law and that it was prepared to defend them." *Ibid.*

V.

**The Business Practices Engaged in by the Petitioner, A & P, if Sanctioned by the Court, Would Permit A & P, and Other Retail Chains, to Resume the Very Business Abuses Which Motivated Congress to Enact the Robinson-Patman Act.**

An examination of the position taken by the Petitioner, A & P, in this case, together with that taken by it in the *Parker* suit, indicates that A & P is endeavoring to reinstitute many of the same predatory business practices which Congress intended to prohibit when it enacted the Robinson-Patman Act more than 40 years ago.

As previously noted, prior to the enactment of the Robinson-Patman Act, retail store chains were able to use their massive purchasing power to extract, from their suppliers, large price discounts which were not justified, economically, by any "savings" resulting from the volume of those purchases. These discounts, in turn, gave the chains an enormous economic advantage over their smaller competitors.

In the *Parker* suit, the Petitioner, A & P, has taken the position, on the purported authority of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977), as interpreted by one Milton Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 831 Antitrust and Trade Reg. Rep. (BNA) F-1, at F-3 (1977), that there can be no recovery in a private antitrust suit, unless there has been an "antitrust injury," and that competitors of a large retail store chain, such as A & P, buying from the same supplier, sustain no "antitrust injury" when the chain, by economic coercion, obtains, from their common supplier, a price discount forbidden by Section 2(a) of the Robinson-Patman Act, *provided* that the chain does not use that discount to undersell those competitors. That is to say, there is no "antitrust injury" when the chain "pockets" the illegal discount, and uses it to strengthen its financial and competitive position generally, but does not "pass on" a part of the discount to the public in lower prices.

Obviously, if this position should be sustained, the Robinson-Patman Act very rapidly would become a dead letter.

The large retail chains of the Country could use their economic power to coerce large discounts from their suppliers by the threat of taking their business elsewhere, just as A & P did in this case. All that would be required to avoid legal liability would be that a chain represent to a given supplier that it had received, from an unnamed competitor of the supplier, an offer at a lower price than that charged by the supplier to the chain and to its other customers. It would not matter if no such offer

had ever been made. The supplier would be protected if it met but did not beat that competitive "offer," and, under the doctrine advanced by A & P in the *Parker* suit, the chain would in its turn be immune from suit provided it did not pass on the discount to the public in lower prices.

In this case, the Petitioner, A & P, does not go quite as far as it does in the *Parker* suit, but it comes close.

> "[T]he meeting competition defense remains available to a seller who makes a better offer in good faith, as other courts have consistently held. Thus Borden's offer was within that defense, and A & P should have been allowed to assert it." Pet.'s Br. 15.

Also, in *Parker,* again on the purported authority of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra,* the Petitioner has advanced a theory of damages which would likewise render the Robinson-Patman Act a legal nullity.

There now exists a marked difference of opinion, not yet resolved by this Court, among various Courts of Appeals and District Courts, as to the proper measure of damages recoverable in a Robinson-Patman Act suit. See *Fowler Mfg. Co.* v. *Gorlick,* 415 F. 2d 1248, 1250-1252 (9th Cir. 1969), *cert. denied,* 396 U. S. 1012, 90 S. Ct. 571, 24 L. Ed. 2d 503 (1970).

The matter is exhaustively considered in an annotation to the *Fowler* case, "Measure and Elements of Damages for Violation of the Robinson-Patman Act (15 U. S. C. § 13)." 9 ALR Fed. 279 (1971).

> "The principal division of authority over the question of damages in suits for violation of the Robinson-Patman Act concerns the so-called 'General Damage Rule, under which the Measure of Damages is the amount of the unlawful price or other unlawful payment. The Rule has been recognized or applied in some cases and rejected or refused application in others.
>
> * * * * *
>
> "Opposed to General Damages are the so-called 'Special' or 'Consequential' damages suffered by a plaintiff through

the loss of business or property as a result of the discrimination." *Id.* at 284, 285, 286.

At present, the General Damage Rule is followed in the Ninth Circuit, the Eighth Circuit, the Northern District of Illinois, and, probably, the Seventh Circuit. *Id.* at 289-292. The Special, or Consequential Damage Rule is followed in the Second Circuit, the Sixth Circuit, and the Districts of Louisiana and Massachusetts. *Id.* at 292-295.

Although the question of the quantum or measure of damages was not before the Court in the *Pueblo Bowl-O-Mat* case, or referred to in the Court's Opinion, the Petitioner, A & P, has taken the position, in *Parker*, that the *Pueblo Bowl-O-Mat* decision repudiates the Geneal Damage Rule, leaving only Special or Consequential Damages to be recovered in a private antitrust action for violations of the Robinson-Patman Act.

Obviously, if the favored chain does not "pass on" the illegal discriminatory discount to the public in lower prices, there is no way that its disfavored competitors could ever prove Special or Consequential Damages in the form of loss sales, or diversion of business to the chain.

Again, if such a position should be sustained, the Robinson-Patman Act very rapidly would become a dead letter. Suppliers of large chains would be protected if they met but did not beat "competitive offers" which the chain claimed to have received, whether or not, they, in fact, beat such other offers, and the chain would in its turn be immune from suit by its disfavored competitors provided only that it does not pass on the discount to the public in lower prices.

We submit that the case at bar is a proper one for the Court firmly to establish two propositions vital to effectuate the intent of Congress when it enacted the Robinson-Patman Act: One, that competitors of a chain, or other large merchandiser, that are buying from a common supplier, have sustained an "antitrust injury" when the chain receives, from that supplier, a discrimination in price forbidden by the Act, regardless of whether

the chain "passes on" the illegal discount to the public in lower prices; and, Second, that in such a case the measure of the damages sustained by the disfavored competitors of the chain is the amount of the illegal price discount received by that chain, that is to say, the General Damage Rule. Specifically, we suggest the Rule adopted by the Court of Appeals in *Fowler Mfg. Co.* v. *Gorlic, supra*:

> "[W]e hold that under the Robinson-Patman Act, unless the evidence establishes a greater consequential injury, discrimination in prices or allowances is entitled to be regarded as constituting a direct business injury and that the amount thereof thus properly can be made the basis and measure of a General Damage Award."

We must note that in the companion *Parker* case, the aggregate liability of the Petitioner, A & P, is readily ascertainable, under the General Damage Rule, on a class basis. It would be three times the amount of the illegal discount received by A & P during the contract period. It would only remain to apportion the aggregate award among the class plaintiffs, the independent grocers, in the contract area, who during the contract period, purchased milk and other dairy products from Borden.

Conversely, substantial difficulties would be encountered in the event of individual suits, by such independent grocers, against the Petitioner, A & P. Unlike the situation which would prevail in a suit against Borden for charging discriminatory prices in violation of Section 2(a) of the Robinson-Patman Act, the volume of purchases by any one independent grocer, and the prices which he had paid, would be irrelevant, at least initially, in determining the liability of A & P, under Section 2 (f) of the Act, for inducing and receiving a price discrimination forbidden by the Act. In any such separate suit by an independent grocer, it would appear to be necessary, First, to establish the aggregate liability of A & P for receiving the illegal discount, and only then to consider the volume of purchases, and the prices paid by the independent grocer, in determining the portion of the aggregate liability of A & P which

should be awarded to the independent grocer who was the plaintiff in that particular suit.

Obviously, to require such procedure, independent suits rather than class action, would entail an awesome duplication of judicial and legal effort. Also obvious is that a requirement that there by independent suits rather than a class action, would deter suits by independent grocers against chains which, like A & P, had received illegal discounts but which had also, like A & P, been prudent enough to retain them rather than use them to lower prices charged the consuming public. Few independent grocers would have an individual claim large enough to warrant a major legal effort against a corporate giant such as the Petitioner, A & P.

Needless to say, the Petitioner, A & P, has been most vociferous in its opposition to the maintenance of *Parker* as a class action.

And the position which it has taken in *Parker,* together with that in the case at bar, is persuasive that A & P has undertaken to repeal, judicially, the Robinson-Patman Act. And, of course, A & P's effort is most understandable; few federal statutes, in our history, have been directed at a single corporate entity as the Robinson-Patman Act was directed at the Petitioner, A & P, and its business practices prior to the enactment of that statute.

## CONCLUSION.

For the foregoing reasons, we respectfully submit that the Opinion of the Court of Appeals for the Second Circuit should be affirmed. In addition, for the reasons discussed above, we earnestly request that the Court, in its Opinion in this case, recognize that competitors of a large purchaser, recipient of a price discount forbidden by the Robinson-Patman Act, have suffered "antitrust injury" even though that purchaser did not use the illegal discount to lower prices to the consuming public,

and that the measure of damages recoverable by such competitors, is the amount of such illegal discount.

Respectfully submitted,

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EXHIBIT A

# PRICES PAID FOR MILK BY A&P COMPARED TO LOWEST PRICE AVAILABLE TO ITS COMPETITORS IN THE "CHICAGO & SUBURBS AREA" 11/65-12/68

## HOMO—HALF-GALLONS—PAPER

| | | Non-A&P Stores | | A&P Stores | | |
|---|---|---|---|---|---|---|
| Date | Borden List Price[1] | Minimum Price | Maximum Discount From List Price[2] | Private Label Price[3] | Discount From List Price | Percent Overcharge[4] |
| 11/65-1/66 | $0.49 | $0.3479 | 29.0% | $0.3124 | 36.2% | 11.4% |
| 1/66-2/66 | .49 | .3430 | 30.0% | .3124 | 36.2% | 9.8% |
| 2/66-5/66 | .51 | .357 | 30.0% | .3254 | 36.2% | 9.7% |
| 5/66-8/66 | .52 | .364 | 30.0% | .3254 | 37.4% | 11.9% |
| 8/66-9/66 | .54 | .378 | 30.0% | .3376 | 37.5% | 12.0% |

1. Source: CX 137, 139-150.
2. Sources: CX 120, 138; Gose Tr. 1110.
3. Source: CX 255B.
4. Calculated by dividing the difference between the minimum price paid by others and the private label price by the private label price paid by A&P.

| Date | Borden List Price | Non-A&P Stores: Minimum Price | Non-A&P Stores: Maximum Discount From List Price | A&P Stores: Private Label Price | A&P Stores: Discount From List Price | Percent Overcharge |
|---|---|---|---|---|---|---|
| 9/66-10/66 | $0.56 | $0.392 | 30.0% | $0.3514 | 37.3% | 11.6% |
| 10/66-11/66 | .56 | .392 | 30.0% | .3534 | 36.9% | 10.9% |
| 11/66-3/67 | .56 | .392 | 30.0% | .3514 | 37.3% | 11.6% |
| 3/67-4/67 | .55 | .385 | 30.0% | .3376 | 38.6% | 14.0% |
| 4/67-5/67 | .55 | .385 | 30.0% | .3416 | 37.9% | 12.7% |
| 5/67 | .57 | .399 | 30.0% | .3502 | 38.6% | 13.9% |
| 5/67-9/67 | .57 | .399 | 30.0% | .3534 | 38.0% | 12.9% |
| 9/67-5/68 | .59 | .413 | 30.0% | .3664 | 37.9% | 12.7% |
| 5/68-7/68 | .61 | .427 | 30.0% | .3762 | 38.3% | 13.5% |
| 7/68-12/68 | .62 | .434 | 30.0% | .3828 | 38.3% | 13.4% |

A2

## HOMO—GALLONS—PAPER

| Date | Borden List Price | Non-A&P Stores: Minimum Price | Non-A&P Stores: Maximum Discount From List Price | A&P Stores: Private Label Price | A&P Stores: Discount From List Price | Percent Overcharge |
|---|---|---|---|---|---|---|
| 00/65-00/66 | $0.98 | $0.6958 | 29.0% | $0.6248 | 36.2% | 11.4% |
| 00/66-00/66 | .98 | .686 | 30.0% | .6248 | 36.2% | 9.8% |
| 00/66-00/66 | 1.02 | .714 | 30.0% | .6508 | 36.2% | 9.7% |
| 00/66-00/66 | 1.04 | .728 | 30.0% | .6508 | 37.4% | 11.9% |
| 00/66-00/66 | 1.08 | .756 | 30.0% | .6752 | 37.5% | 12.0% |
| 00/66 00/66 | 1.12 | .784 | 30.0% | .7028 | 37.3% | 11.6% |
| 10/66-11/66 | 1.12 | .784 | 30.0% | .7068 | 36.9% | 10.9% |
| 11/66-3/67 | 1.12 | .784 | 30.0% | .7028 | 37.3% | 11.6% |
| 3/67-4/67 | 1.10 | .770 | 30.0% | .6752 | 38.6% | 14.0% |

A3

| Date | Borden List Price | Non-A&P Stores | | A&P Stores | | Percent Overcharge |
|---|---|---|---|---|---|---|
| | | Minimum Price | Maximum Discount From List Price | Private Label Price | Discount From List Price | |
| 4/67-5/67 | $1.10 | $0.770 | 30.0% | $0.6832 | 37.9% | 12.7% |
| 5/67 | 1.14 | .798 | 30.0% | .7004 | 38.6% | 13.9% |
| 5/67-9/67 | 1.14 | .798 | 30.0% | .7068 | 38.0% | 12.9% |
| 9/67-5/68 | 1.18 | .826 | 30.0% | .7328 | 37.9% | 12.7% |
| 5/68-7/68 | 1.22 | .854 | 30.0% | .7524 | 38.3% | 13.5% |
| 7/68-12/68 | 1.24 | .868 | 30.0% | .7656 | 38.3% | 13.4% |



## HOMO—QUARTS—PAPER

| Date | Borden List Price | Non-A&P Stores | | A&P Stores | | Percent Overcharge |
|---|---|---|---|---|---|---|
| | | Minimum Price | Maximum Discount From List Price | Private Label Price | Discount From List Price | |
| 11/65-1/66 | $0.265 | $0.1882 | 29.0% | $0.1712 | 35.4% | 9.9% |
| 1/66-2/66 | .265 | .1855 | 30.0% | .1712 | 35.4% | 8.4% |
| 2/66-5/66 | .275 | .1925 | 30.0% | .1777 | 35.4% | 8.3% |
| 5/66-8/66 | .28 | .1960 | 30.0% | .1777 | 36.5% | 10.3% |
| 8/66-9/66 | .29 | .2030 | 30.0% | .1838 | 36.6% | 10.5% |
| 9/66-10/66 | .30 | .2100 | 30.0% | .1907 | 36.4% | 10.1% |
| 10/66-11/66 | .30 | .2100 | 30.0% | .1917 | 36.1% | 9.6% |
| 11/66-3/67 | .30 | .2100 | 30.0% | .1907 | 36.4% | 10.1% |
| 3/67-4/67 | .295 | .2065 | 30.0% | .1838 | 37.7% | 12.4% |

| Date | Borden List Price | Non-A&P Stores | | A&P Stores | | Percent Overcharge |
|---|---|---|---|---|---|---|
| | | Minimum Price | Maximum Discount From List Price | Private Label Price | Discount From List Price | |
| 4/67-5/67 | $0.295 | $0.2065 | 30.0% | $0.1858 | 37.0% | 11.1% |
| 5/67 | .305 | .2135 | 30.0% | .1901 | 37.7% | 12.3% |
| 5/67-9/67 | .305 | .2135 | 30.0% | .1917 | 37.2% | 11.4% |
| 9/67-4/68 | .315 | .2205 | 30.0% | .1982 | 37.1% | 11.3% |
| 4/68-7/68 | .325 | .2275 | 30.0% | .2031 | 37.5% | 12.0% |
| 7/68-12/68 | .33 | .2310 | 30.0% | .2064 | 37.5% | 11.9% |

## 2% MILK—½ GALLON—PAPER

| Date | Borden List Price | Non-A&P Stores | | A&P Stores | | Percent Overcharge |
|---|---|---|---|---|---|---|
| | | Minimum Price | Maximum Discount From List Price | Private Label Price | Discount From List Price | |
| 11/65-1/66 | $0.46 | $0.3266 | 29.0% | $0.2914 | 36.7% | 12.1% |
| 1/66-2/66 | .46 | .3220 | 30.0% | .2914 | 36.7% | 10.5% |
| 2/66-5/66 | .48 | 3360 | 30.0% | .3044 | 36.6% | 10.4% |
| 5/66-8/66 | .49 | .3430 | 30.0% | .3044 | 37.9% | 12.7% |
| 8/66-9/66 | .51 | .3570 | 30.0% | .3166 | 37.9% | 12.8% |
| 9/66-10/66 | .53 | .3710 | 30.0% | .3304 | 37.7% | 12.3% |
| 10/66-11/66 | .53 | .3710 | 30.0% | .3324 | 37.3% | 11.6% |
| 11/66-3/67 | .53 | .3710 | 30.0% | .3304 | 37.7% | 12.3% |
| 3/67-4/67 | .52 | .3640 | 30.0% | .3166 | 39.1% | 15.0% |

| Date | Borden List Price | Non-A&P Stores | | A&P Stores | | Percent Overcharge |
|---|---|---|---|---|---|---|
| | | Minimum Price | Maximum Discount From List Price | Private Label Price | Discount From List Price | |
| 4/67-5/67 | $0.52 | $0.3640 | 30.0% | $0.3206 | 38.4% | 13.5% |
| 5/67 | .54 | .3780 | 30.0% | .3292 | 39.0% | 14.8% |
| 5/67-9/67 | .54 | .3780 | 30.0% | .3324 | 38.4% | 13.7% |
| 9/67-5/68 | .56 | .3920 | 30.0% | .3454 | 38.3% | 13.5% |
| 5/68-7/68 | .58 | .4060 | 30.0% | .3552 | 38.8% | 14.3% |
| 7/68-12/68 | .59 | .4130 | 30.0% | .3618 | 38.7% | 14.2% |

## SKIM MILK—½ GALLON—PAPER

| Date | Borden List Price | Non-A&P Stores | | A&P Stores | | |
|---|---|---|---|---|---|---|
| | | Minimum Price | Maximum Discount From List Price | Private Label Price | Discount From List Price | Percent Overcharge |
| 11/65-1/66 | $0.46 | $0.3266 | 29.0% | $0.2834 | 38.4% | 15.2% |
| 1/66-2/66 | .46 | .3220 | 30.0% | .2834 | 38.4% | 13.6% |
| 2/66-5/66 | .48 | .3360 | 30.0% | .2964 | 38.2% | 13.4% |
| 5/66-8/66 | .49 | .3430 | 30.0% | .2964 | 39.5% | 15.7% |
| 8/66-9/66 | .51 | .3570 | 30.0% | .3086 | 39.5% | 15.7% |
| 9/66-10/66 | .53 | .3710 | 30.0% | .3224 | 39.2% | 15.1% |
| 10/66-11/66 | .53 | .3710 | 30.0% | .3244 | 38.8% | 14.4% |
| 11/66-3/67 | .53 | .3710 | 30.0% | .3224 | 39.2% | 15.1% |
| 3/67-4/67 | .52 | .3640 | 30.0% | .3086 | 40.7% | 18.0% |
| 4/67-5/67 | .52 | .3640 | 30.0% | .3126 | 39.9% | 16.4% |
| 5/67 | .54 | .3780 | 30.0% | .3212 | 40.5% | 17.7% |